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# Victim Impact Evidence and Capital Sentencing: A Casenote on *Payne v. Tennessee*

## I. INTRODUCTION

"Victim impact" evidence is that evidence in a criminal matter relating to the victim's personal characteristics and the emotional impact of the crime on the victim's family.<sup>1</sup> A recent United States Supreme Court decision, *Payne v. Tennessee*,<sup>2</sup> involved the admissibility of "victim impact" evidence at a capital sentencing hearing.

This note will first discuss the facts of *Payne* and the lower courts' holdings and will then briefly review the prior jurisprudence involving victim impact evidence in capital cases. Next is an analysis of the case, followed by this writer's recommendations, both general and specific to Louisiana, in light of this recent Supreme Court decision. Finally, this casenote will conclude with a summary of the use of victim impact evidence in capital cases.

The court held correctly that the Eighth Amendment to the United States Constitution<sup>3</sup> does not erect a per se bar to the admission of victim impact evidence in a capital sentencing hearing.<sup>4</sup> In doing so though, the court seemingly encouraged the use of such evidence. This holding could lead to troubling results if the states take advantage of the free reign given to them by the Court in *Payne* to admit victim impact evidence at a capital sentencing hearing. This note will discuss some of the evils of admitting this type of evidence and propose that states, particularly Louisiana, keep this type of evidence out of the sentencing phase of a capital trial where the accused faces the possibility of being sentenced to death.

## II. *PAYNE V. TENNESSEE*

*Payne* involved the brutal murder of a twenty eight year-old woman, Charisse Christopher, and her two year-old daughter Lacie. Charisse's three year-old son Nicholas was also a victim of this crime, yet miraculously survived the attack. The three victims lived across the hall from the defendant's

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1. *Payne v. Tennessee*, 111 S. Ct. 2597, 2604 (1991).

2. *Id.*

3. U.S. Const. amend. VII: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

4. *Payne*, 111 S. Ct. at 2609.

girlfriend in a building which housed four apartments. At the time of the offenses, Payne had been awaiting the return of his girlfriend from a trip to Arkansas. Upon her continued absence, and after considerable drinking and injecting of cocaine, Payne entered the victims' apartment and made sexual advances toward Charisse Christopher. After she refused Payne's advances, an angered and intoxicated Payne brutally attacked the three victims with a butcher knife.<sup>5</sup>

A neighbor who resided in the apartment directly below the Christophers' apartment heard Charisse screaming "[g]et out, get out," as if she was urging her children to leave the apartment.<sup>6</sup> The neighbor then called the police. When the first officer arrived at the scene, he encountered Payne leaving the building drenched in blood. Payne claimed to be the complainant. When the officer asked Payne what was going on, Payne struck the officer with the overnight bag he was carrying and ran. He was apprehended later that day.<sup>7</sup>

Charisse and Lacie Christopher were dead when the police entered the apartment. Charisse had sustained 41 thrusts of a butcher knife, which in aggregate caused her to bleed to death. Similarly, Lacie died of numerous knife wounds. Nicholas was still alive despite several wounds inflicted by the knife that completely penetrated his body. He survived the assault after undergoing seven hours of surgery and receiving more blood than his estimated normal blood volume. Throughout the trial Payne insisted that he had not harmed any of the Christophers but rather had tried to help them and in doing so became covered with blood.<sup>8</sup>

At trial, Payne was found guilty of two counts of first degree murder and one count of first degree assault with the intent to commit murder in the first degree. The controversy in this case centered around the admission of testimony of Charisse's mother at the defendant's sentencing hearing following the guilty verdicts. Her testimony concerned the effect of the murders on Nicholas. Charisse's mother stated:

He cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie. He comes to me many times during the week and asks me, Grandmama, do you miss my Lacie. And I tell him yes. He says, I'm worried about my Lacie.<sup>9</sup>

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5. *Id.* at 2601-02.

6. *Id.* at 2601.

7. *Id.* at 2601-02.

8. *Id.* at 2602.

9. *Id.* at 2603.

Additionally, when arguing for the death penalty during the closing argument, the prosecutor spoke of the continuing effect of the murders on Nicholas.<sup>10</sup>

The Tennessee Supreme Court affirmed the conviction, finding that the testimony in question, "[w]hile technically irrelevant, . . . did not create a constitutionally unacceptable risk of an arbitrary imposition of the death penalty, and was harmless beyond a reasonable doubt."<sup>11</sup> The court additionally found that "the prosecutor's argument [was] relevant to this defendant's personal responsibility and moral guilt."<sup>12</sup> The court went on to say, "assuming the [prosecutor's] argument here violated the Eighth Amendment, as interpreted by the United States Supreme Court, we think it subject to harmless error analysis."<sup>13</sup> Undoubtedly and understandably, the court was influenced by the egregiousness of this particular case when it applied the harmless error analysis. However, the court should have based the sentencing decision on the heinousness of the offense alone, rather than allowing the jury to consider the irrelevant evidence concerning the unintended consequences of Payne's actions on the victims' family.

### III. PRIOR JURISPRUDENCE

Until *Payne*, this type of evidence, termed "victim impact" evidence, was previously held to be inadmissible at the sentencing phase of a capital trial under the Eighth Amendment of the Constitution.<sup>14</sup> The Supreme Court first addressed this issue in *Booth v. Maryland*.<sup>15</sup> In this case, a Maryland statute provided for victim impact statements which described the personal characteristics of the victims and the emotional impact of the crimes on the family to be prepared in capital cases. The statement also included the opinions and characterizations of both the crimes and the defendant expressed by the victims' family members. The victims in *Booth* were an elderly couple who were killed by the defendants during an attempt to rob the couple in their home. The couple had children and grandchildren who provided the information for the victim impact statement. "Many of their comments emphasized the victims' outstanding personal qualities, and noted how deeply the Bronsteins would be missed."<sup>16</sup>

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10. *Id.*

11. *State v. Payne*, 791 S.W.2d 10, 18 (Tenn. 1990).

12. *Id.* at 19 (quoting *Enmund v. Florida*, 458 U.S. 782, 801, 102 S. Ct. 3368, 3378 (1982)).

13. *Id.* at 19.

14. *Booth v. Maryland*, 482 U.S. 496, 107 S. Ct. 2529 (1987) and *South Carolina v. Gathers*, 490 U.S. 805, 109 S. Ct. 2207 (1989).

15. *Booth*, 482 U.S. 496, 107 S. Ct. 2529.

16. *Id.* at 499, 107 S. Ct. at 2531.

The Supreme Court reversed the defendant's death sentence imposed by the Maryland court, finding that the admission of victim impact evidence at the sentencing phase of a capital trial created a constitutionally unacceptable risk that the jury may have imposed the death penalty in an arbitrary and capricious manner. This is because in a capital case, the sentencing decision must focus on the defendant as a "uniquely individual human being,"<sup>17</sup> and, the Court reasoned, "[t]he focus of a VIS [victim impact statement], however, is not on the defendant, but on the character and reputation of the victim and the effect on his family." This creates a problem because "[t]hese factors may be wholly unrelated to the blameworthiness of a particular defendant."<sup>18</sup>

The Supreme Court revisited the issue in *South Carolina v. Gathers*.<sup>19</sup> In *Gathers* the defendant was convicted of murder and criminal sexual conduct and sentenced to death. Here the prosecutor read to the sentencing jury at length from the religious tract that the victim was carrying at the time of the crime and commented on the personal qualities that he inferred from the victim's possession of such tract and a voter registration card. The Supreme Court affirmed the South Carolina court's decision which had held that the prosecutor's comments "conveyed the suggestion appellant deserved a death sentence because the victim was a religious man and a registered voter."<sup>20</sup> The Court reasoned that in capital cases, the defendant's punishment "must be tailored to his personal responsibility and moral guilt."<sup>21</sup> The Court noted that it had left open the possibility that the kind of information contained in victim impact statements could be admissible if it "relate[d] directly to the circumstances of the crime."<sup>22</sup> It concluded, however, that this exception was not met here and that the prosecutor's comments were not directly related to the circumstances of the crime merely because the tract and the voter registration card were strewn around the victim's body.

#### IV. ANALYSIS OF THE CASE

##### A. *The Majority Opinion*

In *Payne*, the Court overruled this prior jurisprudence by deciding the Eighth Amendment erects no per se bar to victim impact evidence.<sup>23</sup>

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17. *Id.* at 504, 107 S. Ct. at 2534 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304, 96 S. Ct. 2978, 2990 (1976)).

18. *Id.* at 504, 107 S. Ct. at 2534.

19. 490 U.S. 805, 109 S. Ct. 2207 (1989).

20. *State v. Gathers*, 295 S.C. 476, 484, 369 S.E.2d 140, 144 (1988).

21. *Enmund v. Florida*, 458 U.S. 782, 801, 102 S. Ct. 3368, 3378 (1982).

22. *Booth v. Maryland*, 482 U.S. 496, 507 n.10, 107 S. Ct. 2529, 2535 n.10 (1987).

23. *Payne v. Tennessee*, 111 S. Ct. 2597, 2609 (1991).

The Court reasoned: "Victim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities."<sup>24</sup> The majority went on to state that "there is nothing unfair about allowing the jury to bear in mind that harm at the same time as it considers the mitigating evidence introduced by the defendant."<sup>25</sup> Here Payne had produced four witnesses to testify on his behalf who stated that the offenses in question were generally inconsistent with Payne's character.<sup>26</sup> The majority thus concluded that Tennessee could properly admit the testimony of Charisse Christopher's mother given at the defendant's sentencing hearing and affirmed the death sentence.<sup>27</sup> In other words, the Court felt that since the defendant had introduced evidence as to his good character, the prosecution could similarly introduce evidence as to the good character of the victims.

The Court also discussed the doctrine of *stare decisis*, but concluded that when past decisions, like *Booth* and *Gathers*, are unworkable or badly reasoned, the Court does not feel constrained by the precedent.<sup>28</sup>

The precise holding of the Court, i.e., "if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar,"<sup>29</sup> appears to be fundamentally correct. In *Harmelin v. Michigan*,<sup>30</sup> handed down the same day as *Payne*, a plurality of the Court held that the Eighth Amendment contains no proportionality guarantee between crime and punishment. In its discussion, the *Harmelin* Court examined the history of the Eighth Amendment and found that the clause was meant to disable the "[l]egislature from authorizing particular forms or 'modes' of punishment—specifically, cruel methods of punishment that are not regularly or customarily employed."<sup>31</sup> Additionally, the Court found that "the fact that what was 'cruel and unusual' under the Eighth Amendment was to be determined without reference to the particular offense is confirmed by all available evidence of contemporary understanding."<sup>32</sup> It thus follows that the Eighth Amendment is not an evidentiary rule,<sup>33</sup>

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24. *Id.* at 2608.

25. *Id.* at 2609.

26. *Id.* at 2602.

27. *Id.* at 2611.

28. *Id.* at 2609 (citing *Smith v. Allwright*, 321 U.S. 649, 665, 64 S. Ct. 757, 765 (1944)).

29. *Payne v. Tennessee*, 111 S. Ct. 2597, 2609 (1991).

30. 111 S. Ct. 2680 (1991).

31. *Id.* at 2691.

32. *Id.* at 2693.

33. It has been decided that capital punishment is not inherently cruel or inhumane. The purpose of the Eighth Amendment is to prevent the imposition of inhumane, unusual

and was not designed to address the issue of admissibility of evidence. Therefore, as the Court found in *Payne*, the Eighth Amendment does not mandate the exclusion of victim impact evidence.

While the Eighth Amendment may not provide a basis for exclusion, as this article will explore, there are many other valid reasons why this type of evidence should be excluded at the sentencing phase of a capital trial. The potential for the imposition of the death penalty in an arbitrary and capricious manner is too great.<sup>34</sup> When it stated "[t]here is no reason to treat such evidence differently than other relevant evidence is treated," the Court erred.<sup>35</sup>

### *B. Justice O'Connor's Concurrence*

In the words of Justice O'Connor, "[w]e do not hold today that victim impact evidence must be admitted, or even that it should be admitted."<sup>36</sup> She went on to state that "[i]f, in a particular case, a witness' testimony or a prosecutor's remark so infects the sentencing proceeding as to render it fundamentally unfair, the defendant may seek appropriate relief under the Due Process Clause of the Fourteenth Amendment."<sup>37</sup> This writer submits this is not enough protection for a capital defendant. By its very nature victim impact evidence is unduly inflammatory. Sentencing is a crucial stage in the capital proceeding for a defendant. His life is at stake and the jury's emotions are preyed upon by grieving family members of the victim. Therefore, the jury is more likely to impose the death sentence on an emotional whim rather than because of this defendant's moral responsibility based on the circumstances of the crime. Additionally, this argument is flawed in that Justice O'Connor assumes such evidence is relevant and has some bearing on the defendant's personal responsibility and moral guilt which it does not.

### *C. Justice Scalia's Concurrence*

Justice Scalia begins his opinion by stating: "The Court correctly observes the injustice of requiring the exclusion of relevant aggravating

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punishments such as maiming, mutilating, and other methods of torture, etc. It is not a vehicle to prohibit evidence at a hearing to determine whether or not to impose a penalty which does not violate the cruel and unusual clause.

34. *Gregg v. Georgia*, 428 U.S. 153, 189, 96 S. Ct. 2909, 2932 (1976) (joint opinion of Stewart, Powell, and Stevens, J.J., stating that the jury's discretion to impose the death sentence must be "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.").

35. *Payne v. Tennessee*, 111 S. Ct. 2597, 2609 (1991).

36. *Id.* at 2612.

37. *Id.*

evidence during capital sentencing, while requiring the admission of all relevant mitigating evidence.”<sup>38</sup>

Scalia’s statement is based on the faulty premise that the defendant and the state are on equal footing. The entire framework of the criminal justice system is set up purposely to be biased in favor of the defendant. This is evidenced by the state’s burden of proof in a criminal case—beyond a reasonable doubt. This is because in the criminal system every accused is presumed innocent until proven guilty beyond this heightened standard. Therefore, the accused is *entitled* to the benefit of every doubt and likewise the benefit of admission of all mitigating evidence without a like privilege being given to the state.

#### *D. Justice Souter’s Concurrence*

Similar to the reasoning of Justice Scalia, Justice Souter stated that “sentencing without such evidence of victim impact may be seen as a significantly imbalanced process.”<sup>39</sup> Again, this is unsupported by the way our criminal justice system treats a defendant. The state is not and should not be on equal footing with a criminal defendant.

#### *E. Justice Marshall’s Dissent*

Justice Marshall’s chief criticism of the majority’s decision is its ready departure from precedent. He stated: “Neither the law nor the facts supporting *Booth* and *Gathers* underwent any change in the last four years. Only the personnel of this Court did.”<sup>40</sup> Justice Marshall felt that the Court lacked “special justification”<sup>41</sup> for departing from precedent.<sup>42</sup> He went on to explain the possible justifications, including “the advent of ‘subsequent changes or development in the law’ that undermine a decision’s rationale, the need ‘to bring [a decision] into agreement with experience and with facts newly ascertained’ and a showing that a particular precedent has become a ‘detriment to coherence and consistency in the law.’”<sup>43</sup> From this Justice Marshall then concluded the majority in *Payne* lacked justification for overruling prior jurisprudence.<sup>44</sup>

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38. *Id.* at 2613.

39. *Id.* at 2616.

40. *Id.* at 2619.

41. *Arizona v. Rumsey*, 467 U.S. 203, 212, 104 S. Ct. 2305, 2310-11 (1984).

42. *Payne v. Tennessee*, 111 S. Ct. 2597, 2621-22 (1991).

43. *Id.* at 2621-22 (citing *Patterson v. McLean Credit Union*, 491 U.S. 164, 173, 109 S. Ct. 2363, 2370-71 (1989); *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 412, 52 S. Ct. 443, 450 (1932)).

44. *Id.* at 2621-22.



*F. Justice Stevens' Dissent*

Justice Stevens responded to the majority's conclusion that fairness requires victim impact evidence be admissible to counteract the mitigating evidence which the defendant is entitled to introduce by pointing out flaws in the majority's reasoning.<sup>45</sup> Justice Stevens pointed out that this reasoning is based on the incorrect proposition that a criminal prosecution requires an even-handed balance between the state and the defendant.<sup>46</sup> Significantly, he noted, the criminal system is designed to protect the criminal defendant, as is illustrated by the heavier burden of proof and rules of evidence.<sup>47</sup> This follows from the disproportionate and significantly flawed resources available to a criminal defendant whose liberty is at stake as compared to the powerful state.

Alternatively Justice Stevens noted that "[j]ust as the defendant is entitled to introduce any relevant mitigating evidence, so the State may rebut that evidence and may designate any relevant conduct to be an aggravating factor provided that the factor is sufficiently well defined and consistently applied to cabin the sentencer's discretion."<sup>48</sup>

In his dissenting opinion Justice Stevens also pointed out the evils of comparative judgments by use of a hypothetical situation. "Thus, if a defendant, who had murdered a convenience store clerk in cold blood in the course of an armed robbery, offered evidence unknown to him at the time of the crime about the immoral character of his victim, all would recognize immediately that the evidence was irrelevant and inadmissible."<sup>49</sup>

## V. RECOMMENDATIONS

In deciding this case, the Court stated that the Eighth Amendment erects no barrier to the admission of victim impact evidence. But, by unnecessarily discussing at length why such evidence is relevant to the sentencing inquiry, the Court effectively condones the states' admission of such evidence in capital proceedings. The majority in *Payne* found such evidence relevant by drawing an analogy between the admission of victim impact evidence to sway the jury in favor of imposing the death penalty and the differing punishments for murder and attempted murder.<sup>50</sup> The rationale is that punishments can be different because of the differing amounts of harm inflicted. The majority compared attempted

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45. *Id.* at 2608.

46. *Id.* at 2627.

47. *Id.*

48. *Id.* at 2627.

49. *Id.* at 2626.

50. *Id.* at 2605.

murder and murder with the death of a victim with no family and the death of a victim who leaves grieving loved ones behind. This analogy is inaccurate, because in the case of attempted murder the intended consequence is death and therefore that death (if in fact the defendant is successful in his attempt) can logically serve to increase the penalty. In the case of victim impact evidence, the defendant may not have even been aware of a victim's family. He therefore has no way of intending the consequence of injury to them, which is a necessary prerequisite to being considered part of a defendant's personal responsibility and moral guilt.

There are many valid policy reasons for the exclusion of victim impact evidence, and the Supreme Court would have done well to point them out in *Payne*. It is illogical to hold a defendant responsible for factors that "may be wholly unrelated to the blameworthiness of a particular defendant."<sup>51</sup> As pointed out in *People v. Levitt*,<sup>52</sup> and referred to in *Booth*, "[s]uch bereavement is relevant to damages in a civil action, but it has no relationship to the proper purposes of sentencing in a criminal case."<sup>53</sup> This is a logical distinction because in a civil trial monetary compensation is the goal, whereas in a capital criminal trial, a person is being punished, and that punishment could be the death penalty.

In addition to the policy reasons supporting inadmissibility, another factor the Court ignored is its holding that in a capital trial, the jury must make an "individualized determination" of whether the defendant should be executed based on "character of the individual and the circumstances of the crime."<sup>54</sup> This holding was also cited in *Booth*<sup>55</sup> to support the proposition that while the Court has never said that the defendant's record, characteristics, and the circumstances of the crime are the only permissible sentencing considerations, a state statute that requires consideration of other factors must be scrutinized to ensure that the evidence has some bearing on the defendant's "personal responsibility and moral guilt."<sup>56</sup> This writer submits that victim impact evidence is irrelevant to a defendant's personal responsibility and moral guilt. The admission of such evidence will only serve to increase the number of death sentences based on arbitrary criteria. The Court stated in *Booth* that "[i]t is well-settled that a jury's discretion to impose the death sentence must be 'suitably directed and limited so as to minimize

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51. *Booth v. Maryland*, 482 U.S. 496, 504, 107 S. Ct. 2529, 2534 (1987).

52. 156 Cal. App. 3d 500, 516-17, 203 Cal. Rptr. 276, 287-88 (1984).

53. 482 U.S. 496, 505 n.7, 107 S. Ct. 2529, 2534 n.7 (1987).

54. *Zant v. Stephens*, 462 U.S. 862, 879, 103 S. Ct. 2733, 2743 (1983).

55. 482 U.S. at 502, 107 S. Ct. at 2532.

56. *Enmund v. Florida*, 458 U.S. 782, 801, 102 S. Ct. 3368, 3378 (1982).

the risk of wholly arbitrary and capricious action.”<sup>57</sup> As the dissenters in *Payne* relate, “The victim is not on trial; her character, whether good or bad, cannot therefore constitute either an aggravating or mitigating circumstance.”<sup>58</sup> Under this approach, victim impact evidence would be inadmissible unless it had some bearing on the circumstances of the crime, for example, the defendant’s personal responsibility and moral guilt, thereby making it a foreseeable or intended consequence of his actions.

The admissibility of victim impact evidence is also troubling because as the Court in *Booth* noted, admitting victim impact evidence will promote comparative judgments. In a footnote the majority stated, “We are troubled by the implication that defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy.”<sup>59</sup> This concern was echoed in Justice Stevens’ dissent in *Payne*.<sup>60</sup> In crimes for which the death penalty may be imposed, such as murder, the harm is the death of a human being, not the death of a “worthy” or “unworthy” victim. Surely a defendant should not expect a reduced sentence if he did society a “favor” by eliminating a victim unworthy of life. Society does not recognize such comparative judgments. The death of an individual and the heinousness of the crime alone should be the basis for punishment.

Admitting victim impact evidence also goes against the Court’s previous attempts to give a capital defendant every opportunity to avoid the death penalty. The Supreme Court held in *McCleskey v. Kemp*<sup>61</sup> that states cannot limit the sentencer’s consideration of any relevant circumstances that could cause it to *decline* to impose the death penalty in a capital case. In *Zant v. Stephens*,<sup>62</sup> the Court found that a criminal statute that provided for a mandatory death sentence was unconstitutional. In its reasons for the decision, the Court found that the jury must be able to consider mitigating circumstances that may justify a lesser sentence.

It appears that the underlying rationale of these two cases is to give the jury every opportunity to impose the lesser penalty of life imprisonment. By admitting victim impact evidence, the sentencer is being encouraged to impose the death penalty. This result is directly contradictory to affording the defendant every opportunity to receive the lesser penalty.

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57. *Booth v. Maryland*, 482 U.S. 496, 502, 107 S. Ct. 2529, 2532 (1987) (quoting *Gregg v. Georgia*, 428 U.S. 153, 189, 96 S. Ct. 2909, 2932 (1976)).

58. *Payne v. Tennessee*, 111 S. Ct. 2597, 2627 (1991).

59. *Booth*, 482 U.S. at 506 n.8, 107 S. Ct. at 2535 n.8.

60. *Payne*, 111 S. Ct. at 2631.

61. 481 U.S. 279, 305-06, 107 S. Ct. 1756, 1774-75 (1987).

62. 462 U.S. 862, 103 S. Ct. 2733 (1983).

Finally, the *Payne* Court ignored the basic set-up of the criminal system when it found fairness requires victim impact evidence be admissible to counteract the mitigating evidence which the defendant is entitled to introduce.<sup>63</sup> As the dissent pointed out, this reasoning is faulty because it is based on the incorrect proposition that a criminal prosecution requires an even-handed balance between the state and the defendant.<sup>64</sup> The system is purposely designed to protect the individual from the disproportionately powerful hand of the state. Likewise, rules of evidence are also weighted in the defendant's favor.<sup>65</sup> The state of course can rebut directly the mitigating evidence introduced by the defendant, and thus does not need the admission of victim impact evidence to ensure fairness to the state.

#### VI. RECOMMENDATIONS SPECIFIC TO LOUISIANA

Thus far, Louisiana courts have not admitted victim impact evidence at sentencing hearings in capital trials. The Code of Criminal Procedure dictates in Article 905.2: "The sentencing hearing shall focus on the circumstances of the offense and the character and propensities of the offender. . . ."<sup>66</sup> Further, in order for a jury of twelve to impose the death penalty, it must find that at least one statutory aggravating circumstance exists.<sup>67</sup> The impact on the victim's family is not among the exclusive list of statutory aggravating circumstances warranting the imposition of the death penalty. Louisiana should not amend the list to allow victim impact to increase a sentence of life imprisonment without possibility of parole to death. The statutory list of aggravating circumstances reflects the notion of holding a defendant responsible for the foreseeable or intended consequences of his actions or for an individual characteristic of his by increasing his sentence to death.

Louisiana does have a statute which enumerates the rights of crime victims.<sup>68</sup> This statute gives the victim or the victim's family the right to file a victim impact statement with the court. To date, Louisiana has not applied this statute to capital sentencing hearings.

Louisiana law concerning capital sentencing hearings should not be disturbed in light of *Payne*. As always, Louisiana is able to afford greater protection to its criminal defendants than federal law mandates.

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63. *Payne v. Tennessee*, 111 S. Ct. 2597, 2608 (1991).

64. *Id.* at 2627.

65. *Id.*

66. La. Code Crim. P. art. 905.2.

67. La. Code Crim. P. arts. 905.3, 905.4.

68. La. R.S. 46:1844 (Rights of Crime Victims) (West Supp. 1991).

## VII. CONCLUSION

*Payne*, although a technically correct decision, leaves the states broad discretion in deciding whether to admit victim impact evidence in a capital sentencing proceeding. As pointed out, admission of this evidence is highly inequitable because it is irrelevant to a particular defendant's moral responsibility and personal guilt. Even if it was relevant in a particular case, by its nature this type of evidence is unduly prejudicial. It encourages comparative judgments based on emotion rather than reason. It therefore has no place in a capital sentencing hearing where the defendant should be afforded every opportunity to convince the jury to impose a penalty less than death.

*Elizabeth Anna Meek*